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No. 04-636

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FRIENDS OF FALUN GONG; *et al.*,

Petitioners,

—v.—

PACIFIC CULTURE ENTERPRISE, INC., d/b/a The China Press; SING TAO NEWSPAPERS NEW YORK, LTD., d/b/a Sing Tao Daily; and DAVID MUI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT PACIFIC CULTURE ENTERPRISE, INC. D/B/A *THE CHINA PRESS* IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether the Second Circuit erred in affirming a judgment of the district court which rejected, under New York's common law group libel concept, a defamation claim asserted against a New York–based Chinese-language newspaper by individuals and an organization who were not identified in the articles sued upon but who were merely followers of a worldwide spiritual movement reported on in the articles.

LIST OF PARTIES BELOW

The list of 70 individual petitioners included in the List of Parties in the Petition (Pet. ii) is not identical to the list of 67 individual plaintiffs included in the Amended Complaint (Am. Compl. caption and ¶ 3). The List of Parties in the Petition includes several individuals (Meimiao Lee, Xu Kangang, Lan Sing Cheng, Yahong Bai, and Shihuan Qu) who were not plaintiffs below but who were identified as Appellants on the Second Circuit appeal, and omits other individuals (Zhuli Chen and Lihua Zhao) who were plaintiffs below but not identified as Appellants on the Second Circuit appeal.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent Pacific Culture Enterprise, Inc. d/b/a *The China Press* states as follows: Pacific Culture Enterprise, Inc. and *The China Press* have no parent companies and no publicly held company owns 10 percent or more of the companies' stock.

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Respondent Pacific Culture Enterprise, Inc. respectfully submits that the Petition for a writ of certiorari to review the Summary Order of the United States Court of Appeals for the Second Circuit entered on August 9, 2004 should be denied because no question worthy of the Court's certiorari jurisdiction is presented and no error was committed by the court below.

COUNTERSTATEMENT OF THE CASE

This case was commenced by the filing of a defamation complaint and a demand for a prior restraint on the publication of newspaper articles reporting on the actions of the religious and spiritual movement, Falun Gong. The complaint was filed on behalf of a large number of individual followers of the Falun Gong spiritual movement and a corporate entity, Friends of Falun Gong. That initial complaint was filed in New York Supreme Court, Queens County on April 30, 2002 and an order to show cause application was filed on May 17, 2002 seeking to restrain defendants from "printing or publishing further libelous articles defaming the plaintiffs." The complaint named as a defendant Pacific Culture Enterprise, Inc. doing business as *The China Press* (referred to herein as "*China Press*" or "Respondent"). The complaint also named four editors of or contributors to *The China Press* who have not been served, as well as another Chinese-language newspaper, Sing Tao Newspapers New York Ltd. doing business as *Sing Tao Daily*, and two of its employees and contributors.

A hearing on petitioners' application for an injunction against publication was held on June 6, 2002. After argument, the state court (Hart J.) denied the prior restraint that had been sought, while granting petitioners' request to submit additional papers a month later. Petitioners

then retained new counsel and, on July 19, 2002, served and filed an Amended Complaint in the state court realleging defamation and adding, for the first time, a claim of conspiracy to interfere with their civil rights in violation of 42 U.S.C. §1985(3).

Based on the presence of the newly added federal question, all the served defendants timely removed the case to the United States District Court for the Eastern District of New York on August 13, 2002. No motion to remand was made.

The *China Press* and *Sing Tao* defendants each timely moved to dismiss the Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. United States District Judge Carol Bagley Amon heard argument on April 11, 2003 and granted both motions and dismissed Petitioners' entire complaint on September 23, 2003. (App. B).[1] The district court's twenty-page memorandum opinion held that the claims under 42 U.S.C. §1985(3) were defective both in failing to state facts sufficient to plead any conspiracy and in failing to allege the state action requisite to a §1985(3) claim based on an alleged deprivation of petitioners' First Amendment rights. (App. B, 15a–20a).

The district court exercised its supplemental jurisdiction over the remaining state law claims after concluding that these claims "arise out of the same

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[1] References in the form "Pet. __" are to the Petition for a Writ of Certiorari filed on November 8, 2004. References in the form "App. __" refer to Appendix A and Appendix B annexed to the Petition. References in the form "Am. Compl. __" are to the Amended Complaint filed on July 19, 2002. References in the form "JA __" are to the Joint Appendix filed with the Court of Appeals. References in the form "App. Br. __" are to the Brief and Special Appendix for Plaintiffs-Appellants Friends of Falun Gong et al. filed with the Court of Appeals on March 11, 2004.

underlying facts" and that the outcome of the claims "is plain." (App. B, 22a). The district court dismissed the defamation claims under New York's common law group libel doctrine as based on statements not "of and concerning" either the individual plaintiffs-petitioners or the corporate plaintiff-petitioner, none of whom is mentioned in any of the articles. (App. B, 22a–27a). The district court also dismissed claims of common law prima facie tort and violation of § 40-c of the New York Civil Rights Law. (App. B, 27a–32a).

A notice of appeal was filed on October 17, 2003. On August 9, 2004 the United States Court of Appeals for the Second Circuit issued a unanimous "Summary Order" affirming the judgment below. (App. A). That order stated that it would "not be published in the Federal Reporter and may not be cited as precedential authority to this or any other court." It affirmed the dismissal both of the claim asserted under 42 U.S.C. §1985(3) and of the New York Civil Rights Law claim. (App. A, 3a–4a). Neither of those claims is the subject of the Petition.

The summary order also determined that the district court had "correctly concluded that the plaintiffs have no valid defamation claim on the face of their complaint." (App. A, 4a). The Court of Appeals noted that plaintiffs were required to allege a statement "by the defendants that was 'of and concerning' individual plaintiffs" and that this " 'requires that the allegedly defamatory comment refer to the plaintiff.' *Brady* v. *Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 228, 445 N.Y.S.2d 787, 788 (2d Dep't 1981)." (App. A, 4a). But, the Court held,

> "the allegedly defamatory newspaper articles in the instant case do not refer specifically to any of the plaintiffs; instead they are about either individual

> practitioners of Falun Gong who are not plaintiffs in this suit, Falun Gong itself, or the group of New York-based Falun Gong practitioners. They are therefore not 'of and concerning' any of the plaintiffs." (App. A, 4a-5a) (footnote omitted).

The Second Circuit did not reach (nor did the district court) the alternative basis for dismissal urged by respondents, *i.e.*, that the complaint alleged no false and defamatory statement of objective fact.

The petition for a writ of certiorari in this case addresses only the dismissal of the petitioners' defamation claims.[2]

COUNTERSTATEMENT OF FACTS

The claims asserted in the Amended Complaint stem from the publication of articles in *The China Press* and another Chinese-language newspaper that were critical of the religious and spiritual practices of Falun Gong, a group with membership in the "millions," according to the complaint (Am. Compl. ¶¶ 13, 18), of which petitioners claim to be local practitioners.[3] Petitioners are a New Jersey-based not-for-profit corporation known as Friends of Falun Gong and 67 individuals described in the Amended Complaint merely as "U.S. citizens or alien residents of the U.S. within the City and State of

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[2] It was undisputed that New York defamation law applied to those claims.

[3] All the articles in question appeared in the Chinese language. Petitioners' defamation claims are premised on their own English language translation of the highly nuanced Chinese original. Respondents pointed out below that the translations failed to comply with New York statutory requirements under N. Y. CPLR 2101(b). That issue was not reached below.

New York."[4] Falun Gong is described in the Amended Complaint as "an association of individuals aimed at cultivating physical and spiritual values" premised upon a system of religious and spiritual beliefs known as "Falun Dafa." The corporate petitioner ("Friends of Falun Gong") claims no governing authority or responsibility with respect to Falun Gong activities. Petitioners describe themselves collectively as a "part of a discrete, readily identifiable sub-grouping of Falun Gong practitioners located within the New York metropolitan area." [5] (Am. Compl. ¶ 15) The Amended Complaint does not allege that any of the 67 individual plaintiffs, or the corporate plaintiff, was mentioned in any of the articles.

The Amended Complaint challenges various articles published during the period from November 1999 to May 2002, alleging that the Respondents engaged in "relentless publication of false and defamatory statements concerning the Plaintiffs." (Am. Compl. ¶ 1). The Amended Complaint asserts that respondents "have acted as an unofficial mouthpiece for the Chinese government" with the aim of preventing Petitioners from engaging in the "exercise of their First Amendment privileges of association and expression." *Id.* Among other things, petitioners complain of allegedly defamatory articles that purportedly call Falun Gong an "evil cult" (according to petitioners' translations) whose practitioners have "twisted souls" and are "subject to 'mind

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[4] As noted above at page ii, although the Amended Complaint identified 67 individual plaintiffs (Am. Compl. ¶3), the List of Parties in the Petition (Pet. ii) lists 70 individual petitioners.

[5] On appeal to the Second Circuit, Petitioners acknowledged that they were part of (and not distinguishable) from a group of 120-350 New York practitioners of Falun Gong. (App. Br. 27-28).

control.' " (Am. Compl. ¶ 60). The Amended Complaint alleges that petitioners' newspapers are "owned and/or directly or indirectly controlled by the People's Republic of China" (Am. Compl. ¶ 26) and suggests that the newspapers have followed the Chinese government "line" in making various statements criticizing the Falun Gong movement (Am. Compl. ¶ 19-34); and see Petition at 3-4.

On the basis of the newspapers' articles, the Amended Complaint purported to set forth common law claims for "Defamation" (Am. Compl. ¶ 79-90) and "Defamation Per Se" (Am. Compl. ¶¶ 91-96) as well as other claims not at issue on this Petition.

REASONS FOR DENYING THE WRIT

Summary of Argument

The Second Circuit, in its Summary Order (designated not for publication), affirmed the district court's decision to dismiss petitioners' defamation claims by applying the group libel doctrine, long recognized under New York common law, to conclude that the allegedly defamatory statements are not "of and concerning" any of the petitioners. The application of this established state common law doctrine to preclude a libel claim here raises no question of constitutional law or other important question warranting this Court's review.

I.

THE GROUP LIBEL DOCTRINE LONG PRECEDED APPLICATION OF THE FIRST AMENDMENT TO LIBEL LAW AND DOES NOT RAISE ANY CONSTITUTIONAL ISSUE HERE

Petitioners assert that this Court's review is needed because it is "unclear if the 'of and concerning test' was constitutionally required" (Pet. 14) and because the circuit courts are "uncertain" what factors determine whether an individual member may recover for group defamation (Pet. 16). It is undisputed, however, that the decision of the Second Circuit, like the district court decision that the Court of Appeals affirmed, applied New York law and not any federal constitutional rule in dismissing the complaint:

The common law of New York has long recognized that defamation law protects only the individual reputations of persons or entities, and not the reputations of groups or sects. *See, e.g., Rykman* v. *Delavan*, 25 Wend. 186 (N.Y. 1840) ("[T]he libellous matter . . . must have been applied to the plaintiff as an individual, and not to a class of persons merely, when he sues for a personal libel on himself."); *Watts-Wagner Co.* v. *General Motors Corp.*, 64 F. Supp. 506, 508 (S.D.N.Y. 1945) ("In general, defamatory statements used broadly in respect to a general class of persons give no right of action to a member of the class, unless some circumstance makes the statements reasonably susceptible of special application to any individual of the class."). The common law of other states likewise has long imposed a bar against group libel. *See, e.g., Fowler* v. *Curtis Publishing Co.*, 182 F.2d 377 (D.C. Cir. 1950); *Brewer* v. *Hearst Publishing Co.*, 185 F.2d 846 (7th Cir. 1950) (Illinois law); *Owens* v. *Clark*, 6 P.2d 755 (Okla. 1932). Thus, long

before this Court held in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), that the First Amendment limits aspects of state defamation law, states through their common law, and New York in particular, through its common law, already limited claims that were premised on an alleged libel of and concerning an entire group.

Petitioners note that this Court has alluded to constitutional aspects of the "of and concerning" requirement in both *New York Times* v. *Sullivan*, 376 U.S. at 288 and *Rosenblatt* v. *Baer*, 383 U.S. 75, 82–83 (1966). (Pet. 14–15). Each of those cases involved a media defendant charged with libel for having published criticism of government activities without naming the specific individual plaintiff. Although the "of and concerning" requirement has constitutional dimensions in potentially *limiting* the reach of the common law tort of libel, those dimensions are not implicated here, since the Second Circuit applied the New York common law itself and found the claim wanting under that state's laws. There is no suggestion that a constitutional requirement could provide a basis to *expand* the reach of local defamation law. Indeed, in *Paul* v. *Davis*, 424 U.S. 693 (1976), this Court made clear that there is no constitutional basis for providing a libel claim to those to whom the state law has denied a claim.[6]

There is no "uncertainty" (Pet. 16) among the circuits concerning the application of the "of and concerning" requirement in the group libel context. To the extent that

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[6] In *Emerito Estrada Rivera-Isuzu de P.R., Inc.* v. *Consumers Union of United States, Inc.*, 233 F.3d 24, 28 (1st Cir. 2000) (cited by petitioners at Pet. 15), the First Circuit reviewed the constitutional precedents and concluded that it was "advisable" to decide the appeal of a libel judgment on local law grounds. The case did not suggest any basis rooted in the Constitution to override the limits on the scope of actionable libel imposed by local law.

the cases cited by petitioners may emphasize different factors for determining whether an individual plaintiff may recover for defamation of a group, such variations follow from the fact that each court was applying the controlling common law of the state in which the claims arose, as is required of the federal courts under *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). *See, e.g., Schuster* v. *U.S. News & World Report, Inc.*, 602 F.2d 850, 854 (8th Cir. 1979) ("under Minnesota law defamation of a large group of persons was not actionable unless it could reasonably be understood to apply to a particular plaintiff"); *Michigan United Conservation Clubs* v. *CBS News, Inc.*, 665 F.2d 110, 112 (6th Cir. 1981) ("Under Michigan law 'it is not enough for a complainant to allege that he is a member of a group allegedly defamed.' ") (internal citation omitted); *Alvord-Polk, Inc.* v. *F. Schumacher & Co.*, 37 F.3d 996, 1015–16 (3d Cir. 1994) (Pennsylvania law; even statements that disparage a relatively small group may not serve as a basis for a defamation claim unless a reader could reasonably connect them to the individual plaintiff); *Fawcett Publications, Inc.* v. *Morris*, 377 P.2d 42, 51–52 (Okla. 1962) (plaintiff football player could maintain an individual action for libel where entire 50–60 person football team was defamed and plaintiff was readily identified with the team). One can hardly complain of a "lack of certainty" or absence of uniformity of decision where the source of law is the differing laws of the individual states.

II.

DISAGREEMENT AS TO THE CORRECT APPLICATION OF NEW YORK'S COMMON LAW GROUP LIBEL DOCTRINE DOES NOT RAISE AN ISSUE APPROPRIATE FOR THIS COURT'S REVIEW

Petitioners assert that a decision of one intermediate appellate court, *Brady* v. *Ottaway Newspapers, Inc.*, 84 A.D. 2d 226, 445 N.Y.S.2d 786 (2d Dep't 1981), sets out the controlling New York law and that the decision of the Second Circuit in this case was incorrect because the Circuit Court failed to apply or discuss the approach that was used by the *Brady* court. (Pet. 20-22). In *Brady* the New York Appellate Division, Second Department applied an "intensity of suspicion" test, after concluding that the test was "consistent with New York law." *Brady*, 84 A.D.2d at 237, 445 N.Y.S.2d at 793. The *Brady* court considered a number of factors, including the size of the group, in terms of definiteness in number and composition, public perception of the group's size, its degree of organization and the prominence of its members, in determining that the plaintiffs were sufficiently identified to permit their claims to survive the state's group libel bar. *See Brady*, 84 A.D.2d at 238-39, 445 N.Y.S.2d at 794-95.

Petitioners acknowledge that the Second Circuit cites the *Brady* decision in its discussion of the "of and concerning" requirement, yet they nonetheless fault the Circuit Court for failing to make clear "how, if at all, the Second Circuit applied the 'intensity of suspicion test' " and for not discussing in its decision the particular factors that had been considered by the *Brady* court. (Pet. 21–22). From those assertions, petitioners then leap to the conclusion that the Second Circuit committed an

error of constitutional magnitude by failing to apply the "intensity of suspicion" test. (Pet. 22). Petitioners present no support for their conclusion that the Second Circuit did not adequately consider *Brady* (which was discussed in the briefs and argument both in the district court and on appeal), let alone for the contention that an error in interpreting either the *Brady* decision or the body of New York law on group libel raises an issue of constitutional dimension.

More important, petitioners offer no basis for concluding that the ruling below is anything but one of New York law, which is not a question that warrants review by this Court. This Court routinely declines to review the determination of questions of state law by the intermediate federal appellate courts. *See Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944). *Accord Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985) (deference to lower federal courts on questions of state law "reflect[s] our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective states"); *Butner* v. *United States*, 440 U.S. 48, 58 (1979) ("The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues."); *Cort* v. *Ash*, 422 U.S. 66, 72 n.6 (1975) ("our practice of deference to such determinations should generally render unnecessary review of their decisions in this respect"); *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949) ("We ordinarily accept the determination of local law by the Court of Appeals.").[7]

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[7] This Court has stated that it will defer to lower courts on state-law issues unless there is "plain error" or the view of the lower court is "clearly wrong" or "clearly erroneous." *Brockett* v. *Spokane Arcades, Inc.*,

III.

THE DECISION BELOW WAS PLAINLY CORRECT

To succeed on their defamation claim, petitioners must have alleged a defamatory statement by the defendants that was "of and concerning" the individual plaintiffs and not merely "an impersonal reproach of an indeterminate class." *Brady* v. *Ottaway Newspapers, Inc.*, 84 A.D. 2d at 228, 445 N.Y.S.2d at 788. Petitioners contend that by applying the "intensity of suspicion" test and examining the various factors that the *Brady* court considered, "the court of appeals *could* reasonably find that the articles are referring to the petitioners." (Pet. 23) (emphasis added). Even this cautiously worded prediction is overly optimistic. Whether a simple numerical approach or an "intensity of suspicion" test is applied, it is plain that the courts below correctly applied New York law in concluding that the articles upon which petitioners based their defamation claims are *not* "of and concerning" these petitioners.

The Court of Appeals recognized, and petitioners do not dispute, that petitioners have not identified any alleged defamatory statement that refers specifically to any individual petitioner or to the corporate petitioner, Friends of Falun Gong. (App. A, 4a–5a; *see also* App. B, 23a). The failure to refer to any plaintiff cannot be remedied by alleging that they are members of a large group that has been defamed. Petitioners pleaded that the arti-

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472 U.S. at 500 n.9 (internal citations omitted). As discussed in Part III below, nothing in the Petition suggests that this case was wrongly decided, let alone that it presents the exceptional circumstances necessary to warrant a departure from the Court's ordinary deference to the lower federal courts' interpretation of state law.

cles are "of and concerning" them because they are a "sub-grouping of Falun Gong practitioners" (Am. Compl. ¶ 15) or "New York City-based Falun Gong practitioners" (Am. Compl. ¶ 34). But under New York's common law group libel doctrine, defamation of any large group is not actionable by a member of the group or by an entity purporting to act on its behalf. *See, e.g.*, *Anyanwu* v. *Columbia Broadcasting System, Inc.*, 887 F. Supp. 690, 692 (S.D.N.Y. 1995) ("It is not sufficient that the plaintiff is libeled as a member of a large group."); *Church of Scientology International* v. *Time Warner, Inc.*, 806 F. Supp. 1157, 1160 (S.D.N.Y. 1992) ("Under the group libel doctrine, a plaintiff's claim is insufficient if the allegedly defamatory statement referenced the plaintiff solely as a member of a group. . . . Thus, if a plaintiff is libeled as a member of a large group, the 'of and concerning requirement' is not properly pleaded."), *aff'd*, 238 F.3d 168 (2d Cir.), *cert. denied*, 534 U.S. 814 (2001); *National Nutritional Foods Ass'n* v. *Whelan*, 492 F. Supp. 374, 380 (S.D.N.Y. 1980) ("New York follows the general common law rule, applied since *The King* v. *Alme & Nott*, 3 Salk. 224, 91 Eng.Rep. 790 (1699), that group libel is not actionable."); *Puerto Rican Legal Defense and Education Fund, Inc.* v. *Grace*, 9 Media L. Rep. (BNA) 1514, 1514-15 (Sup. Ct. N.Y. Co. 1983) (nonprofit Puerto Rican community organization may not sue on the basis of defamatory statements about Puerto Ricans).[8]

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[8] *See also Provisional Government of Republic of New Afrika* v. *American Broadcasting Cos.*, 609 F. Supp. 104, 108 (D.D.C. 1985) ("Allegations of defamation by an organization and its members are not interchangeable. Statements which refer to individual members of an organization do not implicate the organization. By the same reasoning, statements which refer to an organization do not implicate its members."); *Khalid Abdullah Tariq Al Mansour Faissal Fahd Al Talal* v. *Fanning*, 506 F. Supp. 186 (N.D. Cal. 1980) ("*Fanning*") ("[t]he aim of defamation law

Petitioners do not contest the fact that they are not specifically mentioned in the challenged articles, nor do they present any other basis to conclude that the articles focused specifically on them. Petitioners do not cite to any language in the articles or any circumstances surrounding respondents' publication of the statements that shows the alleged statements referred to these particular petitioners individually or as members of a specifically defined New York organization, as opposed to only as members of a larger group.

Courts applying a numerical approach to the group libel doctrine have generally held that the bar to recovery applies to groups of 25 or more. *See, e.g.*, *Alexis* v. *District of Columbia*, 77 F. Supp. 2d 35, 41 (D.D.C. 1999) ("The courts traditionally have required quite a small group—no more than 20 or 30 members—before they will hold that defamation of the group should be deemed to have particular application to a group member who is not named in the defamatory remarks."); Restatement (Second) of Torts § 564A comment b (1977); 1 Robert D. Sack, *Sack on Defamation: Libel, Slander and Related Problems* § 2.9.4, at 2-133 (3d ed. 2004). Although "New York courts have not set a particular group number above which defamation of a group member is not possible," the courts "have allowed individuals to pursue libel claims where they were identified as a member of a group of less than sixty." *Anyanwu* v. *Columbia Broadcasting System, Inc.*, 887 F. Supp. at 693 (dismissing defamation claims of group of over 500

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is to protect individuals; a group [there, Muslims] may be sufficiently large that a statement concerning it cannot defame individual group members"; granting motion to dismiss); *Mikolinski* v. *Burt Reynolds Production Co.*, 409 N.E.2d 1324, 1325 (Mass. App. Ct. 1980) (Polish-American Guardian Society may not sue on the basis of defamatory statements about Poles in motion pictures; affirming grant of motion to dismiss).

Nigerians engaged in international business with U.S. citizens).

Based on numbers alone, the Falun Gong group, with adherents numbering in the millions, is unquestionably too large to support an actionable claim of defamation by members of the group. (*See* Am. Compl. ¶ 13, quoting with approval a New York State resolution stating that "the practice has reached millions of people in 40 countries" and Am. Compl. ¶ 18, quoting with approval a U.S. House of Representatives resolution stating that Falun Gong has "millions of adherents in China and elsewhere.") Despite petitioners' efforts on appeal below to portray their "group" as "a contained group of New York practitioners known for their exercises in particular parks and other public locations" (App. Br. at 8), the Amended Complaint nowhere alleged that the 67 individual plaintiffs constitute all the New York practitioners nor provided a basis to distinguish these 67 plaintiffs from all other New York practitioners, let alone from the broader group of Falun Gong practitioners worldwide who are the subject of most of the allegedly defamatory references. Indeed, in their argument below, petitioners could not distinguish themselves from other "New York practitioners" whom they variously numbered as "120 active Falun Gong practitioners in New York City" (App. Br. 27-28) or 350 "practitioners in the New York area." (App. Br. at 28). Plainly, under the numerical approach the group is too large to support an "of and concerning" claim under New York law.

Analysis under the *Brady* court's "intensity of suspicion" test yields the same result. In *Brady* the court identified a number of factors for use in determining whether or not a defamation action survives the group libel doctrine. The factors include the size of the group, in terms of its definiteness in number and composition, the pub-

lic perception of the size of the group, its degree of organization and the prominence of its members. *See Brady*, 84 A.D.2d at 238-39, 445 N.Y.S.2d at 794-95.

As to size and degree of organization, petitioners' difficulty in defining the number of allegedly defamed New York practitioners of Falun Gong is itself telling. Petitioners break themselves into "two categories" in the Amended Complaint—the "Friends of Falun Gong" and 67 individual Falun Gong practitioners, described as "U.S. citizens or alien residents of the U.S. within the City and State of New York." (Am. Compl. ¶¶ 3-4). At oral argument on respondents' motions to dismiss, however, petitioners could not provide a precise number for the New York Falun Gong community but admitted "[i]t is more than 67."[9] (JA 530, ll. 10-16). Later, on appeal, petitioners variously claimed (without any support in the Amended Complaint or in the record) that there are "120 active Falun Gong practitioners in New York City" (App. Br. at 27-28) and then that "[a]t most, the practitioners in the New York area approximate 350" (App. Br. at 28).

In addition, although the Falun Gong practitioners suing for defamation are asserted to be based in New York (Am. Compl. ¶¶ 3-4), the principal focus of the articles, as petitioners themselves trumpet, is China: "All the 'homicides', 'immolations', other crimes and illegal actions supporting the conclusions in the reports *occur in China and not anywhere else in the world.*" (Pet. 4) (emphasis added). While the size of a group and the definitiveness of its composition are not the sole dispositive factors in determining whether the "of and con-

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[9] As noted above at page ii, although the Amended Complaint identified 67 individual plaintiffs (Am. Compl. ¶3), the List of Parties in the Petition (Pet. ii) lists 70 individual petitioners.

cerning" requirement has been sufficiently pleaded under the "intensity of suspicion test," *Brady*, 84 A.D.2d at 238-40, 445 N.Y.S.2d at 794-95, the fluid and uncertain number of New York Falun Gong practitioners, evidenced by petitioners' own pleadings and brief, militates against a holding that the size factor of the test has been adequately pleaded. Unlike the fluctuating group of New York Falun Gong practitioners in this case, the defined group of police officers at issue in *Brady* "was definite and its size was fixed in 1972." *Brady*, 84 A.D.2d at 239, 445 N.Y.S.2d at 794.

As to public perception of the size of the group, petitioners' allegations suggest a perception that the group is enormous. The Petition itself recognizes that the allegedly defamatory statements may well "be applied to Falun Gong practitioners worldwide as a whole." (Pet. 24). This view is simply inconsistent with the individualized identification that is required if a claim for defamation is to overcome the group libel bar. The fact that the articles refer both to local Falun Gong activities and to activities in China and elsewhere (Am. Compl. at ¶¶ 31, 53, 57, 70) militates in favor of a determination that public perception of the size of Falun Gong must be that it is both very large and geographically diverse. *See Brady*, 84 A.D.2d at 238, 445 N.Y.S. 2d at 794 ("Public perception of the size of the group is an important factor in focusing on the degree of suspicion attributed to individual members of the group irrespective of the actual size of the group."). Such a conclusion supports the determination that the district court's dismissal of petitioners' defamation claims under the group libel doctrine, and the Second Circuit's affirmance of that decision, were plainly correct.[10]

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[10] An alternative, independently sufficient basis for dismissal was presented to both the district court and the Court of Appeals but not

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

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RESPECTFULLY SUBMITTED,

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reached by either, namely the absence of any alleged false statement of objective fact, which is a *sine qua non* for liability both under federal law and under the still more demanding New York law. The "key inquiry is whether challenged expression, however labeled by defendant, would reasonably appear to state or imply assertions of objective fact." *Immuno AG v. J. Moor-Jankowski*, 77 N.Y.2d 235, 243, 567 N.E.2d 1270, 1274, 566 N.Y.S.2d 906, 910, *cert. denied*, 500 U.S. 954 (1991). Petitioners' defamation claims would not have withstood this basis for dismissal, as the Amended Complaint failed to identify any allegedly false and defamatory statements that amount to false statements of objective fact. The central theme in the Amended Complaint, for example, the repeated allegation that *The China Press* called the Falun Gong "an evil cult" (Am. Compl. ¶¶ 30, 35, 46, 49, 60, 65, 71, 72, 76, 82, 89), is precisely the type of subjective expression that does not constitute an actionable statement of fact.